APPENDIX.

EXCERPT FROM CARRIAGE OF GOODS BY SEA ACT.

Act of April 16, 1936, c. 229, Sec. 3, 49 Stat. 1208, 46 U.S.C.A., Secs. 1303(3), (4) and (5).

Contents of Bill.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods; *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as Prima Facie Evidence.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein de-

scribed in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81-124 of Title 49.

Guaranty of Statements.

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS OF LAW.

WOOD, *J.* October 31, 1967.

This is an action[1] by the owner of goods to recover damages from the carrier for failure to account for the quantities acknowledged on the bills of lading issued on loading.[2] The carrier impleaded the stevedore who discharged, cared for and eventually consigned the goods after docking, on the theory that all the cargo was delivered but part of it was somehow lost while in control of impleaded respondent. The carrier is suing to recover the amount of any judgment entered in favor of libellant herein plus attorney's fees and costs paid in defending the suit.[3] After a trial without a jury, we make the following:

FINDINGS OF FACT.

1. Libellant, A. C. Israel Commodity Co., Inc., a corporation existing under the laws of the State of New York, with its principal office in New York City, buys and imports edible commodities, including cocoa beans for resale.

2. Respondent American-West African Lines, a corporation doing business in the eastern district of Pennsylvania, operates merchant vessels as carriers of cargo by sea.

3. Respondents, D/S A/S DEN NORSKE AFRIKAOG AUSTRALIE LINIE and WILHELMSENS DAMPSKIBSATIESELSKAB and A/S TONSBERG and A/S TANKFART I and A/S TANKFART IV

1. Libellant has elected to prosecute the Admiralty action. The claim against Reading Company was dismissed with the agreement of counsel for libellant.

2. All claims for slackage have been abandoned.

3. Further action will be taken by the Court if counsel cannot agree on the legal or factual aspects of this issue.

and A/S TANKART V and A/S TANKFART VI, foreign corporations, owned and operated the M/V TANA which was a merchant vessel operating as a carrier of cargo by sea between the ports of Lagos, Nigeria and Philadelphia, Pennsylvania.

4. Impleaded respondent Lavino Shipping Co. is a Pennsylvania corporation with its principal office and place of business in Philadelphia and was engaged by the carrier to act as its agent, stevedore and terminal operator at Pier 78 South in Philadelphia.[4]

5. The carrier admits that on or about May 21, 1961, at Lagos, Nigeria, it received a shipment of 48,000 bags of cocoa beans consigned to plaintiff. In addition, other cargo was delivered to the ship for transport, including 32,000 other bags of cocoa beans. The total cargo destined for transport to Philadelphia was 5,058 tons and included lumber and goatskins.

6. Clean on board bills of lading were issued by the ocean carrier in the ordinary course of business at the time of loading the goods for transportation aboard M/V TANA, acknowledging receipt of 80,000 bags of cocoa beans. The ship's stowage plan and the ship's manifest also indicated that 80,000 bags were aboard ship. There is no evidence that the vessel made its own count of the bags at Lagos. There was no evidence other than the documents and the admission of the ship that the vessel had received the acknowledged amount.

7. There is no evidence that any cargo was lost during the ocean voyage or anywhere between Lagos and Philadelphia.

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4. Libellant will be referred to as "shipper"; respondents will be referred to as "carrier"; and impleaded respondent will be referred to as "stevedore".

8. Of the quantity of beans consigned to plaintiff, 32,000 bags were main crop Lagos and 16,000 were light crop Lagos.

9. On June 21, 1961, the M/V TANA arrived at Pier 78 South in Philadelphia. Lavino Shipping Company, which leased and controlled Pier 78 South was designated as agent for the shipowner and in addition to its other duties discharged, stored and consigned the ship's cargo.

10. Lavino from the time the ship docked was in control of the cargo.

11. All of the cargo was completely discharged from the vessel between the arrival date and June 20, 1961. Lavino's records indicate that 5,059 tons of cargo were discharged from the ship.

12. At the time of discharge of the cargo from the ship to Pier 78, there were other bags of cocoa beans on the pier with the same mark as those discharged from the M/V TANA. Whatever bags were there were probably palletized in one spot of the pier.

13. Lavino was under an obligation to provide and use only safe, sound and seaworthy equipment and to refrain from any act which would damage the cargo and to conduct the stevedoring operation in a careful, proper and efficient manner and further properly to account for all bags of cargo being discharged from the carrier and delivered to the consignees or their agents.

14. The SS AFRICAN DAWN discharged bags of cocoa beans with the same mark as those consigned to Libellant while 1,459 bags from the M/V TANA's cargo were still on the pier.

15. Lavino hired checkers to count all bags of cocoa beans as they were discharged from the ship onto the pier.

This was the first of three tallies made. According to those making the tallies, the outturn of the five holds of the M/V TANA did not correspond with the ship's stowage plan or manifest. This first count showed a total shortage of 1,962 bags out of 80,000 to be discharged. The checkers computed that number 4 hold alone lacked 2,309 bags which the ship's stowage plan called for. They determined that the other holds had overages.

16. There was some testimony that several other ships from Nigeria had reported similar shortages in their cargo.

17. Between June 26 and July 10, Lavino executed delivery instructions given by or on behalf of libellant for 4,200 bags of main crop cocoa beans.

18. After the bags had been discharged from the M/V TANA, they were kept in Lavino's custody until delivery as a warehouseman inside the pier shed under the aegis of three shifts of watchmen for 24 hours a day. No evidence was shown of theft.

19. The remainder of plaintiff's cargo assumed to be 43,800 bags was placed into Reading Company railcars by Lavino, for delivery to Terminal Warehouse Company in Philadelphia, between July 2 and July 10, 1961.

20. Lavino through its checkers counted the number of bags as they were placed into the cars. Their count showed a shortage of 341 bags in the Israel cargo. The railroad made no independent count of the bags but accepted the tallies made by Lavino.

21. Lavino's delivery book regarding cargo from the M/V TÁNA (Exhibit P-10) shows that all 80,000 bags of cocoa beans were delivered but 341 bags.

22. After the railroad cars had been loaded, each car was sealed, so that it could not be opened, and the contents

removed without breakage of the seal. The checkers at Terminal Warehouse, a subsidiary of Lavino, after the seals had been broken and while the cargo was being unloaded computed that the freight cars did not contain 473 bags of the supposed shipment of 43,800 or 132 more of a deficiency of bags than the checkers at the Pier had computed.

23. There were no shortages noted as to those rail cars whose seals were not in order. There were found to be numerous shortages and overages between the stevedore's tally records showing loadings into the cars and the warehouse tally records showing the discharge from the cars. Each car was found to have the same numbered seal on it as when it left the pier. The Reading was in no way responsible for any of the losses.

24. Lavino investigated the shortages at the direction of counsel for the ocean carrier. In addition to other checks, it requested each of the consignees of the 4,200 bags of cocoa beans to verify the quantity and mark of the bags received by them, to ascertain if there were overages. All replied but only one consignee admitted an overage and that was one of five bags. The consignee was billed for the additional bags.

25. The checkers employed to tally the amount of cargo from ship to pier were casual union employees disinterested in Lavino's operations and not very reliable. Those employed to tally the amount of cargo from dock to railcars were more reliable. The checkers at Terminal Warehouse were regular employees.

26. The first check showed a shortage of 1,962 bags out of 80,000; the second check showed a shortage of 341 bags; the third check showed a shortage of 473 bags and a discrepancy in many railcars between what the second

checkers tallied and the third checkers found. Lavino is responsible for at least the first two checks. We place more reliance on the last check because of the fact that each car was checked on an individual basis against tallies already made and many inaccuracies were found and because of the regular employment of the checkers. Terminal Warehouse consigned the bags delivered to various buyers from Israel. Their records (P-6) show the amount delivered and the amount received from the railroad cars. These records show the shortages and are probably much more accurate than the tallies made by Lavino.

27. Each bag of beans contained a mark identifying the quality of the beans and the port of loading but contained nothing to indicate to whom it was consigned. The bags of one owner were not separated from those of another in the holds of the ship. When the 80,000 bags of cocoa beans were discharged from the ship, the stevedore merely apportioned the lot according to the respective bills of lading. The bills of lading indicated that libellant owned 32,000 bags of main crop, NCMB Nigeria and 16,000 bags of light corp, NCMB Nigeria. Of these, 4,200 bags of main crop were shown to have been delivered to various consignees.

28. The warehouse failed to receive 433 bags of main crop and 40 bags of light crop which should have been delivered. It was shown that 5 bags were delivered to a consignee over its consignment and which were probably main crop since this was the content of its entire proper delivery. Accordingly, the ship has failed to account for 428 bags of main crop and 40 bags of light crop.

29. Lavino in turn failed to account to the carrier for the disappearance of the same bags which we find were loaded on ship in Lagos and which were delivered to Philadelphia.

30. The bags each contained an average of 140 pounds of beans. The final delivery of libellant's cargo was made on July 10, 1961, to Terminal Warehouse when the market value for main crop Lagos cocoa beans was 21¾ cents per pound and the market value for light crop Lagos cocoa beans was 20⅞ cents per pound. The market value of the 428 main crop bags was $13,032.60; the market value of the 40 light crop bags was $1,169.00.

DISCUSSION.

There is no dispute as to the applicable essential principles of law controlling this litigation. First, the bills of lading are prima facie proof of their content which however can be rebutted by competent evidence. The respondents are liable on a bailment theory for failure to deliver all of the shipper's cargo if they have no legal defense. Finally, the impleaded respondent is liable over to the respondents if it cannot properly account for the cargo discharged at the pier. See *Panama Canal Co. v. Stockard & Co.*, 391 Pa. 374 (1958). The main problem here is on whom the loss must fall.

First, it is clear that the carrier is liable to the libellant. It admitted receipt of the lost cargo but could offer no explanation of the loss except to blame its agent, Lavino, for whose defaults it is liable. The carrier therefore seeks indemnity from Lavino, who attempts to exonerate itself by arguing that all the evidence tends to show that the vessel never received the lost goods and that Lavino has accounted for all the cargo that was discharged at the pier.

The stevedore tries to prove this by arguing that its checkers counting the number of bags as they were being discharged in Philadelphia found a substantial shortage and that the cubic capacity of the hold number four could

not have contained the number of bags provided for on the ship's manifest. It points also to the testimony that similar shortages had occurred in other ships from Nigeria. The argument falters however because we can give no weight at all to the checks made by Lavino's employees. There were too many discrepancies and too many possibilities of error on its part. Further, the testimony as to other shortages does not prove that this ship had a shortage. First, we do not know the circumstances behind the other shortages nor secondly do we know the quantities or the goods which were short.

Despite Lavino's protestations, we hold that it is liable to the ship for any damages which it must pay to the libellant. All of the following facts point to some mishandling of the cargo on the part of Lavino's employees: the prima facie effect of the bills of lading, the substantial variances in the three checks, the variances found in many cars between what was supposedly in them and what they actually contained, the delivery of five extra bags to one consignee, which was known only because of the consignee's admissions, the presence of similar cargo although localized on the pier during the unloading of the M/V TANA, the arrival of another ship containing similar cargo and finally the weighing of the cargo which showed a greater tonnage than that loaded onto the vessel in Lagos.

While no one could ascertain how the missing bags had been lost, it is probable that a larger quantity was delivered to the first consignee than had been ordered and/or that there had been some thefts from the pier or that somehow the M/V TANA's cargo had become confused with some other cargo. Whatever happened, we believe that the bags were received but were lost by Lavino.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction over the parties and of the subject matter.

2. Libellant-plaintiff is the proper party to bring this action, since it was the owner of the bags of cocoa beans at all relevant times.

3. The bills of lading are prima facie evidence of the condition and quantity of the cargo. 46 U. S. C. A. § 1303(3). Lavino has not rebutted their prima facie effect.

4. Lavino was the agent of respondent in all facets of unloading and consignment. Accordingly, respondent is liable to libellant for the failure of Lavino to account for the entire quantity of cocoa beans.

5. Respondent is liable to libellant for failure to deliver 468 bags of cocoa beans belonging to libellant.

6. Lavino in turn is liable to respondent for any damages it is required to pay to libellant for its failure adequately to account for the losses of the cocoa beans.

7. The award of interest is in the discretion of the Court. Libellant is entitled to recover interest at the legal rate from the date of final delivery to Terminal Warehouse, July 10, 1961 to the present on the amount of the damages.

8. The lost goods will be evaluated as of the time of final delivery to Terminal Warehouse since then they would have been available to libellant for resale with the remaining goods. Libellant is entitled to recover $14,201.60 plus the legal rate of interest from July 10, 1961 to the present.

9. Counsel will submit order within ten days.

HAROLD K. WOOD, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17085 and 17110

A. C. ISRAEL COMMODITY CO., INC.

v.

AMERICAN-WEST AFRICAN LINE, INC.,
D/S A/S DEN NORSKE AFRIKA-OG
AUSTRAILIELINIE,
WILHELMSENS DAMPSKIBSAKTIESELSKAB,
A/S TONSBERG, A/S TANKFART I,
A/S TANKFART IV, A/S TANKFART V,
A/S TANKFART VI, AND MV TANA, HER ENGINES,
BOILERS, TACKLE, APPAREL, ETC.,
Appellees,

v.

LAVINO SHIPPING COMPANY,
(IMPLEADED RESPONDENT),
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued May 10, 1968

Before McLAUGHLIN, KALODNER and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT

(Filed July 1, 1968)

VAN DUSEN, *Circuit Judge.*

This admiralty action by an importer and owner for missing bags of cocoa beans consigned to it against the carrier (one of appellees—hereinafter called "appellee") was tried to the court. On the basis of Findings of Fact, Conclusions of Law and a "Discussion," judgment was entered in favor of the owner against the carrier and in favor of the carrier against the stevedore (appellant), as indemnitor, for the full amount of the carrier's liability to the owner.[1] The appeal in No. 17085 is taken from this November 9, 1967, District Court judgment against the appellant.

After a careful review of the record, we can find no basis for holding that the Findings and Conclusions of the trial judge that "the bags were received but were lost by Lavino" were clearly erroneous.[2] See *McAllister v. United States*, 348 U. S. 19, 20 (1954). The contention that appellee waived or abandoned available defenses to the owner's claim is not supported by this record.[3] For the

1. See *David Crystal, Inc. v. Cunard Steam-ship Co.*, 339 F. 2d 295, 299 (2nd Cir. 1964), cert. den. 380 U. S. 976 (1965), holding that a stevedoring company is liable to indemnify a carrier who employs it where such company is responsible for the loss of the cargo. Appellant conceded its obligation "to properly account for all bags of cargo being discharged from the vessel and delivered to the consignees or their agents."

2. The trial judge made clear that he did not accept the testimony of several of appellant's employees.

3. For example, the record shows that appellee's Answer to Requests for Admission denied as much of such Requests as the evidence indicates was justified. In appellee's pre-trial memorandum, it stated: "What happened to the bags thereafter [after unloading] must be explained by Lavino and/or Reading Company," that it might be "responsible" for some of the claims for slackage and that there could not be any liability for more than 341 bags. It is noted that in paragraph 7 of its Answer to the Petition to Implead, appellant alleged:

foregoing reasons, the judgment of November 9, 1967, appealed from in No. 17085, will be affirmed.

After the above-mentioned judgment of November 9, 1967, had been entered by the District Court and a notice of appeal from that judgment had been filed, the trial judge heard argument on appellee's claim for counsel fees and expenses. During this argument, appellant conceded that $2,134.41 represented a fair amount for attorney's fees and costs of appellee in the District Court. The trial judge entered, on December 21, 1967, a supplemental judgment "of $2,134.41 as indemnity for attorney's fees and costs in defending libellant's claim." A timely appeal was filed by appellant from this supplemental judgment, which is docketed in this court as No. 17110. Appellant challenges this judgment on the grounds that appellee "can recover only those fees or expenses allocated to the defense of the primary claim against it" and that appellee offered no defense to the primary claim. The record requires the rejection of the contention that appellee did not make any defense to the primary claim. See, for example, footnote 3, *supra*. Also, the record shows that during the trial appellee called two witnesses, cross-examined at least two of the owner's witnesses, and offered at least six exhibits in evidence after the owner had offered in evidence the

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"It further avers that any damage or short delivery established by the consignees herein was caused by inadequate containers and/or improper stowage on the vessel and/or errors in accounting by respondents and/or negligent handling of the shipment by persons other than the impleaded respondent."

thereby raising personal defenses against the indemnitee but not demanding proof of the number of bags loaded in Africa, which it now claims appellee should have produced. Similarly, no affirmative defenses based on clauses in the bill of lading were included in appellant's Answer to the Libel, so that no evidence on the possible application of Clause 15 was produced at the trial. Also, see 46 U. S. C. § 190 and *David Crystal, Inc. v. Cunard Steam-ship Co., supra*, at 297-300; *Caterpillar Overseas S. A. v. S. S. Expeditor*, 318 F. 2d 720 (2nd Cir.), cert. den. 375 U. S. 942 (1963).

concededly admissible bills of lading evidencing receipt on the ship of the missing bags in Africa. Although some of such trial activity of appellee was directed to showing that appellant was responsible for the missing bags, appellee's counsel objected to evidence offered by libellant and attempted to keep the evidence of the number of missing bags as low as feasible (see, for example, Exhibits D-1 to D-3). Libellant claimed 491 bags lost and slackage of approximately 8500 pounds, but the trial resulted in a finding of 468 bags lost. 127 pages of the trial transcript concerned the principal action. Appellee's evidence, some of which was in defense of the principal action as stated above, covers 33 pages of the transcript and appellant's evidence is contained on 37 such pages.

The general rule, as usually stated, is that counsel fees and expenses incurred by an indemnitee in defense of a law suit can be recovered from the indemnitor if the defense is against the liability indemnified against or if the fees and expenses arise as part of the damages for which the indemnity is granted. 27 Am. Jur., Indemnity, § 27; 42 C. J. S., Indemnity, §§ 13d and 24; *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F. 2d 673, 674 (3rd Cir. 1964), cert. den. 382 U. S. 812 (1965); *United States Lines Company v. E. J. Lavino & Company*, 198 F. Supp. 483, 488 (E. D. Pa. 1961), aff'd. *sub nom. Rogers v. United States Lines Company*, 303 F. 2d 295 (3rd Cir.), cert. den. 371 U. S. 876 (1962); *Frommeyer v. L. & R. Construction Co.*, 261 F. 2d 879, 881 (3rd Cir. 1958). But a distinction is drawn within this general rule when the counsel fees and expenses sought relate to both an indemnitee's activities in defense of the liability asserted by the plaintiff and to an indemnitee's efforts to assert the right to indemnification against his indemnitor. *Frommeyer v. L. & R. Construction Co., supra*, at 881; *Calderone*

v. Naviera Vacuba S/A, 328 F. 2d 578 (2nd Cir. 1964); *Williams v. Pennsylvania Railroad Company*, 267 F. Supp. 495 (E. D. N. Y. 1967); *General Electric Company v. Mason & Dixon Lines, Inc.*, 186 F. Supp. 761 (W. D. Va. 1960); *Holley v. The Manfred Stansfield*, 186 F. Supp. 805, 811 (E. D. Va. 1960).[4]

The federal maritime cases consistently apply the foregoing rule to grant recovery to the indemnitee-carrier against the indemnitor-stevedoring company for counsel fees and expenses, at least insofar as they are incident to its defense of the principal action. E.g., *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc., supra; Shannon v. United States*, 235 F. 2d 457 (2nd Cir. 1956); *DeGioia v. United States Lines Company*, 304 F. 2d 421 (2nd Cir. 1962); *Nicroli v. Den Norske Afrika-og Australielinie, Etc.*, 332 F. 2d 651 (2nd Cir. 1964); *Massa v. C. A. Venezuelan Navigacion*, 332 F. 2d 779 (2nd Cir.), cert. den. 379 U. S. 914 (1964).

The admiralty cases make clear that the carrier-indemnitee is entitled to his expenses, including counsel fees, in defending the principal action particularly where an impleaded respondent invokes personal defenses against him, challenging his right of indemnity as was done in this case.

See, for example, *Crystal* case, *supra*, at 300. Since, as noted above, at least some of appellee's legal activities were in defense of the primary claim against it and were not directed against, but for the benefit of, the appellant-indemnitor, appellee is entitled to the award of some of its counsel fees and expenses, at the least.

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4. *David Crystal, Inc. v. Cunard Steam-ship Co., supra*, at 300, cited by both parties to this appeal, does not discuss the problem of recovery for legal fees which arguably are incurred for legal activities against the indemnitor on the issue of indemnity. Although a substantial issue in *Crystal* concerned interpreting the contract of indemnity, the recovery was for "attorney's fees and disbursements incurred in defendant against . . . [the plaintiff's] claim."

Although the judge allowed the stipulated amount of counsel fee and expenses "as indemnity . . . in defending libellant's claim," the record shows that appellant conceded only that such $2,134.41 was "a fair amount for attorneys' fees and costs in the District Court." Under the above cited cases, it is clear that appellee may recover all, or at least the part, of such sum as is allocable to defense of the principal action in the District Court. With regard to the rest of the legal fees and costs, however, whether the right to indemnification arises in this case under federal admiralty law or state law of bailment or agency,[5] our decision in *Frommeyer v. L. & R. Construction Co., supra,* and the other cases cited above convince us that the issue of counsel fees and expenses should be returned to the District Court for a decision on what portion of the total amount claimed represents legal activities of appellee that do not constitute efforts to establish the right of indemnification from appellant. Drawing such a line is admittedly difficult on the facts in this case and in light of the fact that, as a defense to the "primary" claim of the libellant, both appellant and appellee sought to place sole blame on each other. But no policy consideration of admiralty law[6] or otherwise

5. The opinion of the District Court is unclear as to the precise legal basis for appellee's right to indemnification. Finding of Fact 13 would seem to find an implied contract of indemnification under the admiralty theory of *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124 (1956), whereas the citation of *Panama Canal Company v. Stockard & Company*, 391 Pa. 374, 137 A. 2d 793 (1958) (the only authority cited by the District Court), would suggest that the contract of indemnity was implied under a bailment theory of appellant's liability. Nothing of record indicates the existence of a written contract for indemnity between appellee and appellant.

6. The Supreme Court decisions in *Ryan v. Pan-Atlantic Corp., supra; Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563 (1958); and especially *Crumady v. The J. H. Fisser*, 358 U. S. 423 (1959), may show a general policy of expanding the recovery of an owner-carrier over against the stevedoring company, but this extension arises in the context of providing recovery for injured seamen or longshoremen who have sued one of these parties. In a context in-

seems to militate against asking the District Court to make this difficult factual determination[7] or persuades us that, despite the general rules of indemnity, one party or the other should bear all of the disputed costs and fees on a record such as that in this case.

Accordingly, the judgment appealed from in No. 17110 will be vacated and the case will be remanded for disposition by the District Court in light of this opinion.

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volving the carrier and stevedore only, such as that present in this case; no policy argues for favoring one or the other and an apportionment of counsel fees and costs according to the general rules of indemnity appears to have no consequence of any degree on the protection of longshoremen or seamen.

7. This burden was undertaken by the District Court in the *General Electric* and *Holley* cases cited above at page 5. Cf. *Massa case, supra,* at 782; *Nicroli case, supra,* at 656.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 17085 AND 17110

A. C. ISRAEL COMMODITY CO., INC.

v.

AMERICAN-WEST AFRICAN LINE, INC., D/S A/S DEN NORSKE AFRIKA-OG AUSTRAILIELINE, WILHELMSENS DAMPSKIBSAKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, AND MV TANA, HER ENGINES, BOILERS, TACKLE, APPAREL, ETC.

v.

LAVINO SHIPPING COMPANY,
(IMPLEADED RESPONDENT),

Appellant

ORDER AMENDING OPINION AND VACATING JUDGMENT.

Present: MCLAUGHLIN, KALODNER and VAN DUSEN, *Circuit Judges.*

And now after consideration of the concession in Appellant's petition for rehearing that "the only issue . . . was . . . whether the ocean carrier had exerted any genuine effort to defend the initial suit" as opposed to the

contention in Appellant's brief at page 16 that "the carrier . . . cannot recover . . . fees or expenses for prosecuting the claim for indemnity [and] . . . can recover only those fees or expenses allocated to the defense of the primary claim against it",

It is ORDERED that

(A) The opinion filed July 1, 1968 be amended as follows:

(1) Delate the first full sentence on page 4 thereof, begining "But a distinction . . ." to and including the deletion of footnote 4; and

(2) Substitute the following for all remaining language of the opinion, beginning with the second paragraph on page 5 thereof:

> "See, for example, Crystal case, supra, at 300. Since, as noted above, at least some of appellee's legal activities were in defense of the primary claim against it and were not directed against, but for the benefit of, the appellant-indemnitor, appellee is entitled to the award of its counsel fees and expenses incurred in such defense of the primary claim. Since counsel for both parties have, by their petitions for rehearing, made it clear of record that the above mentioned concessions as to the amount of counsel fees ($2134.40) included solely those fees allocable to appellee's defense of the primary claim, the judgment appealed from in No. 17110, as well as that appealed in No. 17085, will be affirmed."

and

(B) The judgment of July 1, 1968, in No. 17110, entered in accordance with the opinion filed on that date, be set aside and vacated.

By THE COURT,

FRANCIS L. VAN DUSEN,
Circuit Judge.

Dated: July 22, 1968.